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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1934, No. 439.

WILOIL CORPORATION, *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR APPELLEE

Appeal from the Supreme Court of Pennsylvania

WM. A. SCHNADER,
Attorney General of Pennsylvania.

JOHN Y. SCOTT,
Deputy Attorney General.
Attorneys for Appellee.

State Capitol
Harrisburg, Pa.

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v.

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Appeal from the Supreme Court of Pennsylvania, May Term 1934, No. 4, Opinion reported in 316 Pa. 33.

BRIEF FOR APPELLEE

ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE

In order to avoid any possible confusion as to the exact facts of this case, we feel it necessary to make certain additions to appellant's statement of the case.

Appellant is a Pennsylvania corporation with its principal place of business in that State, (R. 17). It is engaged in selling liquid fuels at wholesale and holds a permit so to do under the State tax act (R. 35, 51).

All of the liquid fuels in question were ordered through appellant's Philadelphia agent by purchasers in that city (R. 26). In each case the contracts to sell were subject to, and received, the approval of appellant in Pennsylvania at its Pittsburgh office where a record covering all orders was kept. (R. 17, 26).

Shipments of liquid fuels to fulfill these contracts were made in the manner described in appellant's statement of the case. However, it did not appear that appellant actually owned the liquid fuels in question at the time the contracts for their sale was made.

Appellant charged to the purchasers the amount of the tax on the sale of the liquid fuels in question, and the invoices rendered by appellant to the purchasers set out the tax as a separate item of the total amount billed.

SUMMARY OF ARGUMENT

Appellant, a Pennsylvania corporation, made a contract for the sale and delivery of liquid fuels to certain purchasers in Philadelphia, Pennsylvania. At the time of the agreement the liquid fuels were unascertained. To perform its part of the contract, appellant obtained liquid fuels in Wilmington, Delaware and had them shipped to its purchasers under conditions whereby delivery was made and title passed in Philadelphia.

Under the circumstances, we contend that the imposition of a state tax upon the sale and delivery of the liquid fuels did not constitute an undue burden on interstate commerce but only affected it remotely and incidentally.

There is no decision of this court to the contrary; and certain apparently adverse statements in decisions, which are not relevant on their facts, were made without reference to a situation such as this.

Principles relating to the power of Congress to regulate interstate commerce generally are inapplicable; the question is whether a particular exercise of the state's power to tax in view of its nature and operation presents any obstacle to the execution of the national policy.

ARGUMENT

1. Taxation of the Sale and Delivery of the Liquid Fuels was not an Unconstitutional Burden on Interstate Commerce.

Generally speaking, a state may not levy a tax which directly burdens interstate commerce. However, the mere fact that a tax indirectly or incidentally affects interstate commerce does not constitute a burden on it.

In HUMP HAIRPIN MANUFACTURING CO. v. EMMERSON, 258 U. S. 290 (1922), this rule was stated by Mr. Justice Clarke as follows (p. 294):

> "* * * While a state may not use its taxing power to regulate or burden interstate commerce, * * * on the other hand **it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid** where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. * * * The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely,

so that the tax is not in reality a burden, although in form it may touch, and, in fact, distantly affect, it.

"No formula has yet been devised by which it can be determined in all cases whether or not such a tax is valid; and, applying the repeated declaration of this court, in the cases cited and in many others, that the question is inherently a practical one, depending for its decision on the special facts of each case, we are clear that the tax here involved falls within the excepted class described, even though the business done with residents of states other than Illinois be regarded as interstate." (Bold face ours).

Under the facts of this case the tax only remotely and incidentally affected interstate commerce.

Both appellant and its purchasers conducted their businesses in Philadelphia. The court of common pleas and the State Supreme Court found as facts that the sale and delivery of the liquid fuels took place in Pennsylvania, and further that the agreement between appellant and its purchasers was a contract for the sale of unascertained goods (R. 43, 52, 53). Appellant specifically states on page 3 of its brief that no question as to these findings is raised here.

The fact that appellant secured the liquid fuels in Wilmington for the purpose of performing its agreement with its purchasers was incidental. Since the agreement of appellant was to sell and deliver liquid fuels in Philadelphia when required by the purchasers it was obviously immaterial to those purchasers where appellant procured the liquid fuels. The agreement

of sale did not contemplate that they be procured in Wilmington or in any other particular place. The contract could have been as well performed had appellant procured the liquid fuels in Pennsylvania. Taxation of the sale and delivery of the liquid fuels by appellant to its purchasers, therefore, only remotely and incidentally affected interstate commerce.

An analogous situation was before this court in WARE & LELAND v. MOBILE COUNTY, 209 U. S. 405 (1908). In discussing one of several varying but related situations presented in that case Mr. Justice Day said (p. 413):

> "* * * When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers.
>
> "These contracts are not, therefore, the subjects of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. **The delivery, when one was made, was not because of any contract obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and**

executed the subjects of interstate commerce." (Bold face ours.)

Appellant attempts to distinguish this case as being dissimilar on its facts from the present one. Another portion of the opinion in that case is quoted by appellant to indicate that fulfillment of orders received by the seller from a purchaser in a foreign state was effected by goods purchased for that purpose in such state. While some of the transactions involved were of this nature it is clear that not all of them were; and that the transactions under discussion in the portion of the opinion above quoted were of a different character. The court, as the language indicates, was discussing there a situation differing in no material respect from the one in the present case.

It is impossible to distinguish the present case from that of BANKER BROTHERS CO. v. PENNSYLVANIA, 222 U. S. 210 (1911). In that case Banker Brothers Company was a corporation doing business in Pittsburgh, Pennsylvania as a retail vendor of automobiles. Sales were made by the company before it acquired title to the automobiles sold and were made upon the condition that the purchaser pay the list price of the automobile f. o. b. factory. The factory was that of George N. Pierce Company, in Buffalo, New York. After a sale was made by Banker Brothers Company, the automobile was purchased by them from the factory, and their vendee paid the list price and the freight from Buffalo, New York. Banker Brothers Company was not the agent of the manufacturers but was engaged in business on its own account. The Commonwealth of Pennsylvania sued Banker Brothers Company to

collect a mercantile license tax upon the gross sales of the company to persons in Pennsylvania. This court held that such sales were not transactions in interstate commerce and that the tax was not an undue burden thereon. At page 213 Mr. Justice Lamar said:

> "* * * The fact that he [the purchaser] was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the manufacturer direct.
>
> **"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor,** or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U. S. 146, 49 L. ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania." (Bold face ours.)

Appellant seeks to distinguish the Banker Brothers Case by pointing out that there the cars were shipped originally from a point outside Pennsylvania to Banker Brothers Company, and that the company itself then made delivery in Pennsylvania to the ulti-

mate purchaser. Not only were those facts not made the basis of the decision of this court, but they were barely mentioned in the opinion. It is apparent that the court did not regard them of any particular importance.

Under the principles enunciated in these decisions taxation of the sale and delivery of liquid fuels involved here was not an unconstitutional burden on interstate commerce.

2. The Cases Relied on by Appellant

Appellant principally relies on SONNEBORN BROTHERS v. KEELING, 262 U. S. 506 (1923). The only question actually decided by the court in that case was that a state may tax goods, or the sale thereof, which a foreign corporation has brought into the state and has lodged in its own warehouses, and from which the goods are subsequently sold. The court expressly pointed out that the taxability of sales of goods which were not within the state when sold was not involved (p. 508). The present case involves precisely what the court thus excluded from its discussion.

The appellant quotes from the Sonneborn Case certain language of Chief Justice Taft to the effect that a state may not impose a tax with regard to goods ordered in that state for shipment thereto from another state.

However, in the Sonneborn Case, the sales of goods to be shipped into the state about which the Chief Justice spoke,—but which were not involved in the

actual decision,—were sales by a foreign corporation on orders given to its agent in the state. And without exception, in all the cases cited by the Chief Justice in support of the language relied upon by the appellant, the seller was located in another state than the purchaser and the purchaser made the contract either through a local agent of the non-resident seller or directly with the non-resident seller himself. In all those cases the contract contemplated a shipment from the seller to the purchaser across a state line. The movement in interstate commerce was not simply incidental but was necessarily intended by the parties to the contract of sale. It was only to this state of facts that the language of the Chief Justice was applicable.

In the present case, as well as in the Banker Brothers Case the seller was an independent principal located in Pennsylvania making contracts with purchasers in the same state, although subsequently goods to complete such contracts were procured from persons in another state. Therein lies the true distinction between these cases and the situation discussed in the Sonneborn Case. That it is a real distinction is recognized in WARE & LELAND v. MOBILE, supra.

Here the liquid fuels were shipped to the purchasers direct from a point outside the state but this shipment was incidental to the sale and delivery of the goods. The transactions between the appellant and its purchasers were essentially and fundamentally intrastate transactions.

In the present case the tax was imposed upon the sale and delivery of liquid fuels by appellant in Pennsylvania to its purchasers also in Pennsylvania. The tax was not imposed upon the commodity sold the movement of which an interstate commerce, as we have seen, was incidental to the actual transaction taxed. In other words, the tax involved is an excise tax and not a tax upon property. This was the view taken below by both the Court of Common Pleas and the Supreme Court of Pennsylvania. The appellant here raises a question as to this, for the first time.

Appellant bases its contention that the tax is a property tax on the decision of the Supreme Court of Pennsylvania in COMMONWEALTH v. PURE OIL Co., 303 Pa. 112 (1931). In that case the court had before it a statute passed in 1929 imposing a tax on liquid fuels. The statute, under which the tax in the present case was assessed, was enacted in 1931 and superseded the 1929 act. Whatever may have been the court's opinion as to the nature of the tax under the former act, it is clear from the opinion it rendered in the present case that it construes the present act as imposing an excise tax. The court said (R. 53):

> "* * * **Taxation of the sale or delivery of the gasoline** by appellant to its purchasers, only remotely and indirectly affects interstate commerce."

(R. 57):

> "* * * we are of opinion that the cases herein referred to establish that the gasoline in question, under the facts appearing, was sold and delivered by appellant in Pennsylvania, that **such sale and delivery** did not constitute a transaction in inter-

> state commerce, and that therefore **it was taxable.**" (Bold face ours).

The titles of the two acts are quite dissimilar. The material portion of the title of the Act of 1929 was:

> "Imposing a State **tax on liquid fuels,** including all liquids ordinarily, practically, and commercially usable in internal combustion engines for the generation of power * * *". (Bold face ours).

The corresponding portion of the title of the Act of 1931 is:

> "Imposing a State tax, payable by those herein defined as distributors, **on liquid fuels used or sold and delivered** within the Commonwealth, which are etc. * * *" (Bold face ours).

That the tax imposed by the act here involved is not a tax on property but a tax on **transactions** is clear.

Similar tax statutes have been regarded and treated by this court as imposing excise taxes and not property taxes: PANHANDLE OIL COMPANY v. MISSISSIPPI, 277 U. S. 218 (1928); HELSON AND RANDOLPH v. KENTUCKY, 279 U. S. 245 (1929).

Therefore, the tax was here imposed upon a transaction which was wholly intrastate and not upon the goods. The movement of the goods in interstate commerce, as we have seen, was only incidental to that transaction.

Appellant also relies on FEDERAL TRADE COMMISSION v. PACIFIC STATES PAPER TRADE ASSOCIATION, 273 U. S.

52 (1927). In that case it was held that the Federal Trade Commission had jurisdiction over certain transactions, somewhat similar to those here, because they were in interstate commerce. This court has recently recognized the proposition that the mere fact that the flow of interstate commerce is subject to the regulating power of Congress does not necessarily mean that a state may not tax property or transactions connected with that flow. In MINNESOTA v. BLASIUS, 290 U. S. 1 (1933), Mr. Chief Justice Hughes at page 8 said:

> "But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in Stafford v. Wallace, supra (258 U. S. pp. 525, 526, 66 L. ed. 745, 746, 42 S. Ct. 397, 23 A. L. R. 229), where the Court cited, as an illustration, the case of Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 S. Ct. 299, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford Case quoted from the opinion in the Bacon Case, supra, 227 U. S. 516, 57 L. ed. 620, 33 S. Ct. 299) the following statement of the distinction: **'The question'** (that is, as to the validity of the state tax) **'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'"** (Bold face ours).

In STAFFORD v. WALLACE, 258 U. S. 495 (1922), Chief Justice Taft said (p. 525):

> "The other cases relied on by appellants are less relevant to this discussion than the Anderson and Hopkins Cases. Some of them are tax cases. As to them it is well to bear in mind the words of the court in the Swift Case (p. 400):
>
> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the states.'"

In FEDERAL COMPRESS & WAREHOUSE CO. v. MCLEAN, 291 U. S. 17 (1934), Mr. Justice Stone said (p. 23):

> "* * * The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co v. Tax Commission, supra; Broad River Power Co. v. Query, supra. See Willcuts v. Bunn, 282 U. S. 216, 226, 230, 75 L. ed. 304, 307, 309, 51 S. Ct. 125, 71 A. L. R. 1260."

Both of these cases were cited with approval in the very recent case of CHASSANIOL v. CITY OF GREENWOOD, 291 U. S. 584 (1934), which upheld the validity of a state license tax.

It is difficult to understand what direct bearing NORRINGTON v. WRIGHT, 115 U. S. 188 (1885) and WESTERN UNION TELEGRAPH CO. v. FOSTER, 247 U. S. 105 (1918) have upon the question involved in this

case. They seem to be cited in an attempt to exclude from consideration by this court of the construction which the Supreme Court of Pennsylvania placed upon the contracts of sale between appellant and its purchasers. But that is part of the case, and appellant has not attempted to question it here. In this connection, however, the language of Mr. Justice Stone in FEDERAL COMPRESS & WAREHOUSE Co. v. MCLEAN, supra, would seem to be apropos (p. 22):

> "* * * It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause. See Merchants Warehouse Co. *v.* United States, 283 U. S. 501, 507, 508, 75 L. ed. 1227, 1235, 1236, 51 S. Ct. 505; Superior Oil Co. *v.* Mississippi, 280 U. S. 390, 74 L. ed. 504, 50 S. Ct. 169; Browning *v.* Waycross, 233 U. S. 16, 23, 58 L. ed. 828, 832, 34 S. Ct. 578."

3. Conclusion

The court below followed BANKER BROTHERS Co. v. PENNSYLVANIA, and WARE AND LELAND v. MOBILE COUNTY, supra, in holding that the imposition of liquid fuels tax under the circumstances of this case did not impose a burden upon, and that it only remotely and incidentally affected, interstate commerce.

We submit that the authority of these cases, and their application to the facts of this case, is not affected by the statements in SONNEBORN BROTHERS v. KEELING, and FEDERAL TRADE COMMISSION v. PACIFIC STATES PAPER TRADE ASSOCIATION, which are relied upon by the appellant.

Therefore we respectfully submit that the judgment of the Supreme Court of Pennsylvania should be affirmed.

WM. A. SCHNADER,
Attorney General of Pennsylvania

JOHN Y. SCOTT,
Deputy Attorney General.

Attorneys for Appellee.